In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1385

WALTER B. LEBOWITZ,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

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The petitioner, Walter B. Lebowitz, prays that a writ of certiorari issue to review the judgment and decision of the District Court of Appeal of Florida, Third District, which judgment became final when the Supreme Court of Florida denied further appellate review.

OPINIONS OF THE COURTS BELOW

The March 10, 1977 Opinion of the District Court of Appeal of Florida, Third District is reported at 343 So.2d 666, and reprinted as Appendix A hereto. A timely petition for rehearing was denied on April 13, 1977. (App. B) The Supreme Court of Florida denied the petitioner's petition for a writ of certiorari on December 13, 1978. (App. C)

In a prior appearance in this Court, to wit: Case No.

75-1756, this Court on October 4, 1976, vacated a prior decision of the District Court of Appeal of Florida, Third District, and remanded the case to the latter Court for further consideration. This Court's order is reported at 429 U.S. 808, 50 L.Ed.2d 68, 97 S.Ct. 44. (App. D) The vacated judgment and opinion of the District Court of Appeal of Florida, Third District was decided on May 27, 1975, and is reported at 313 So.2d 473. (App. E)

JURISDICTION

The Order of the Supreme Court of Florida denying the petitioner's petition for writ of certiorari was entered on December 13, 1978. (App. C) The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, § 1257(3) and Amendments V and XIV of the United States Constitution.

QUESTIONS INVOLVED

I

IS IT CONSTITUIONALLY PERMISSIBLE TO CROSS-EXAMINE A DEFENDANT AND COMMENT IN ARGUMENT ABOUT HIS PRE-ARREST SILENCE DURING THE PERIOD THE POLICE ARE EXECUTING A SEARCH WARRANT AND DEFENDANT IS CONFINED.

II

WHETHER AN ERROR OF CONSTITUTIONAL MAGNITUDE INDUCED BY THE STATE BY CROSS-EXAMINING DEFENDANT AS TO HIS PRE-ARREST SILENCE AND COMMENTING ON SAME DURING ARGUMENT CONSTITUTES PLAIN ERROR WHERE THE QUESTIONS AND SUBSEQUENT COMMENT CARRY AN INTOLERABLE PREJUDICIAL IMPACT.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, Constitution of the United States:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

§ 811.16 FSA

"Buying, receiving, concealing stolen property.

"Whoever buys, receives, or aids in the concealment of stolen money, goods, or property, knowing the same to have been stolen, shall be guilty of a felony of the third degree, punishable as provided in §775.082, § 775.083, or § 775.084."

STATEMENT OF THE CASE

Petitioner was convicted in a jury trial of the crime of buying, receiving or concealing stolen property, to wit: a purse valued at $200.00 in violation of § 811.16, Florida Statutes (R 1194). The petitioner was sentenced to eighteen (18) months incarceration. During the October Term, 1976 (Case No. 75-1756), this Court granted certiorari in a prior appearance of this case, vacated the judgment and the case was remanded to the District Court of Appeal of Florida, Third District, for further consideration in light of *Doyle and Wood v. Ohio*, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976). (App. D)

Upon remand, the state court held *Doyle* not controlling inasmuch as the cross-examination did not refer to "post-

arrest" silence (as in *Doyle)*, but rather to silence that took place at the time of the search of petitioner's home. Additionally, the state court found its decision "buttressed" by the fact in *Doyle* objections were made to the cross-examination questions; whereas, in the present case, objections were not made.

Simply stated, the trial was a tug of war with the credibility of the petitioner, an attorney, on one side, and the credibility of his former client, George Foley, on the other.

FOLEY'S TESTIMONY

The State's case rested on the testimony of Foley, who had been convicted of eighteen crimes (R 281), a self-admitted thief (R 411), a self-admitted liar (R 411), had been a patient in a mental hospital (R 381), and was given immunity for his testimony. (R 420)

Foley stated that on November 18, 1973, the petitioner called him and requested that he secure a particular purse for the petitioner's wife by issuing a false check, (R 383-385) for which the petitioner would pay to him twenty-five (25%) percent of the retail value. (R 386)

Foley said he went to the department store on November 23, 1973, and purchased the purse with a check issued on a closed account. (R 288) He received a sales slip which was marked paid in cash. (R 390-392, 1226) On November 26, 1973, Foley returned the purse and received a $208.00 cash refund. (R 392-393) Foley stated he returned to the department store on November 30, 1973, and with the aid of a friend stole the purse, which he gave to the petitioner, and

received $50.00. (R 398-400, 402-403).

On December 7, 1973, Foley relayed the foregoing information to Miami Beach Police, who secured a search warrant for the petitioner's home.

THE SEARCH

At approximately 8:00 A.M. on December 8, 1973, five police officers of the Miami Beach Police Department went to the petitioner's residence, awakened him, read the search warrant and conducted the search. (R 277-290, 317). Defendant was confined to a bedroom where he was ordered by the police to remain. (R 290, 869)

Within moments, an officer found the purse and the petitioner was immediately placed under arrest and was read, *inter alia*, his right to remain silent. (R 290-291).

Before, during and after the search, the petitioner was asked no questions nor did he volunteer any information. (R 783)

PETITIONER'S TESTIMONY

The petitioner denied that he asked Foley to steal or otherwise obtain the purse by worthless check. (R 755) He stated that he had represented Foley in some 25 to 30 civil and criminal cases. (R 734-735) On or about November 20, 1973, Foley came to his residence to discuss a recent arrest, at which time the petitioner told him that he could not continue the conference because he had promised his wife that he would purchase a purse that she had seen. He

said that Foley, as a good will gesture, offered to buy the purse for him. (R 744) Approximately a week to ten days later Foley gave him the purse. (R 747-749)

After his exculpatory testimony, the prosecutor in cross-examination asked and the petitioner answered the following series of questions:

"Q. [By Mr. Carhart] Okay. Now, the police say that when they got finished reading the warrant, you invited them to go search. Is that true?

A. No, sir.

Q. You didn't tell them to go search?

A. I didn't tell them anything, sir. They said go into the bedroom with your family. We want all three of you that woke up, or that are up, to sit on the bed so that we know where you are, something to that effect.

Q. Did you tell them, hey, I know what you're talking about, and I got a purse just like that upstairs in my bedroom?

A. We were upstairs when they read the warrant.

Q. Did you say, hey, I know what you're talking about, and I got a purse like that right there in the closet?

A. I didn't get a chance to. I walked into the bedroom and like a minute later the officer walked in with the purse.

Q. Did they gag you?

A. I was sleeping when the maid called me, sir. I just had been awakened.

Q. But now you're awakened. Now you're listening to the search warrant, and when they finished reading the warrant, did you say, just a second, gentlemen, I know what this is all about and I have got such a purse in my bedroom. I was given it as a gift by George Foley, who showed me a receipt for it. Is that what you said to them?

A. I didn't say anything to them. I followed their instructions, sir.

Q. Well, after they came out with the purse, did you say to them, wait a minute, officers, before you arrest me, or do anything else in this case, let me tell you something. I got that purse. All right. But, I got it from a fellow named George Foley. And he's got a receipt for it. He paid cash for it. Did you tell them that?

A. When they came into the room, one of the officers read a card to me telling me that I had the right to make a telephone call,

which I chose to do.

Q. Came in with the purse and the card?

A. Excuse me, sir.

Q. Came in with the purse and the card?

A. I don't think it was the same officer that came in with the purse.

Q. When the officer with the purse walked into the room--

A. Yes, sir.

Q. -- is that when you told them, hey, I got this purse from George Foley as a gift?

A. I didn't make any statement to the officers. They did not ask me and I did not respond." (R 871-873)

In closing argument the prosecutor said:

"Here's a man, the police come to his home. Knock, knock. They let them in. The maid advises him the police are here. They have a search warrant . . . Now, that might take you by surprise or it might take most people by surprise, but this man is a lawyer. You're dealing in his field. So, he goes down there and the police read him the warrant and they describe the stolen property and they go into the description of the purse. Now,from your common

sense, from your everyday experience, what does the person whose heart is pure, who's an innocent person, a possible victim of circumstances, say at that point? Oh, my God, I got a purse like that up in my bedroom. A client gave it to me the other day as a gift. Does he say, wait a minute, fellows, I know I must have a receipt here someplace. He showed it to me. You don't have to search my house, gentlemen. I've got that purse. Let me get it for you. And, I want to give you a statement right now where I got it from, who gave it to me. I will stand as a witness if there's criminal charges to be brought out of this thing, and see that that man is prosecuted. Or, do you say, go ahead and search. Not from the testimony of George Foley. The Miami Beach Police said that. What do you do?

What did he say when they read the warrant to him? He invited us to go ahead and search. Now, that was very generous of Mr. Lebowitz, five policemen there with a search warrant. That was very generous of him to say go ahead and search. Are you satisified that that's an honest man standing there? Or, is that consistent with the man who knows that he's been had, that he's been caught, that he's trapped with the evidence in his home?" (R 1110)

REASONS FOR GRANTING THE WRIT

I

IS IT CONSTITUTIONALLY PERMISSIBLE TO CROSS-EXAMINE A DEFENDANT AND COMMENT IN ARGUMENT ABOUT HIS PRE-ARREST SILENCE DURING THE PERIOD THE POLICE ARE EXECUTING A SEARCH WARRANT AND DEFENDANT IS CONFINED

Upon remand, the District Court of Appeal of Florida, Third District, considering the case in the light of *Doyle v. Ohio, supra,* found (by a 2 to 1 vote) that *Doyle* is restricted to "post-arrest" silence. Therefore, the Third District erroneously concluded that *Doyle* was inapplicable since the silence in this case took place (prior to arrest) at the time of the search of the petitioner's home.

The rationale of the Third District's holding that defendant had no constitutional right to pre-arrest silence follows:

> "To quote from Mr. Justice Powell, delivering the opinion of the court in the *Doyle* case, 'The question in these consolidated cases is whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest. *We conclude that the use of the defendant's post-arrest silence in this manner violates due process*, and therefore reverse the conviction of both petitioners.' [Emphasis added] A reading of Mr. Justice Powell's opinion leaves no doubt that the thrust of the case was 'post-arrest' oriented."

By the Third District limiting this Court's interpretation of the Constitutional protection of defendant's right against self-incrimination and due process to only "post-arrest" silence the petitioner was deprived of his Fifth and Fourteenth Amendments rights. In *Doyle*, this Court held that the use for impeachment purposes of a defendant's silence at the time of arrest and after receiving Miranda warnings violated

the Due Process Clause of the Fourteenth Amendment.

The so-called distinction urged by the Third District between a prosecutor using for impeachment purposes a defendant's silence prior to receiving Miranda warnings or prior to arrest, and being unable to use a defendant's silence for impeachment purposes at the time of arrest and after receiving Miranda warnings has been rejected by several Federal Circuits.

The Fifth Circuit in *United States v. Impson*, 531 F.2d 274 (5 Cir. 1975), noted in a well-reasoned opinion that there is no policy distinction as to silence *before* or *after* Miranda warnings as seen in the following:

> "The contention is that practically *Miranda* warnings tend to inhibit speech and that silence after such warnings is less inconsistent with innocence than silence in the absence of such warnings. This argument conflicts with the whole purpose and policy of *Miranda* by rewarding the police for failure to inform an accused person promptly upon his arrest of his right to remain silent. Silence is the right of the innocent as well as of the guilty, *Helton v. United States*, Note 3, supra. [221 F. 2d 338, 341-342 (5th Cir. 1955)]. In the face of the numerous legitimate reasons for an arrested person to elect to remain silent we decline to attempt an enumeration of instances in which silence by an arrested person may be of probative value to the government's case. We discern no merit in the appellee's argument that silence in the absence of *Miranda* warnings raises a greater inference of guilt

> than silence following such warnings." [footnote 3 omitted] (531 F.2d 274 at 277).

The Fifth Circuit reaffirmed this principle in the recent case of *United States v. Henderson*, 565 F.2d 900 (5th Cir. 1978), where a prisoner by remaining silent during a search was exercising his constitutional right to remain silent prior to arrest and prior to any Miranda admonitions. The principles and rationale set forth in *Impson* and *Henderson, supra*, are applicable with equal force to the present case.

In like manner, the Seventh Circuit, in *United States ex rel. Allen v. Rowe*, (Case No. 78-2140, 7th Cir., opinion filed Jaunary 8, 1979) held that a state prosecutor in attempting to undermine a defendant's self-defense theory by cross-examining defendant about his *pre-arrest* silence (as well as post arrest silence) and commenting on same in closing argument to the jury as being inconsistent with his self-defense contention violated the Fifth Amendment standards established in *United States v. Hale*, 422 U.S. 171 (1975) and *Doyle v. Ohio, supra.*

The Seventh Circuit in *Rowe* held that *Doyle v. Ohio, supra*, to be controlling, and held further that the *impson* and *Henderson* cases are authority for the principle that there is no distinction between silence occurring prior to and silence occurring after Miranda warnings.

Accordingly, the Third District violated petitioner's constitutional privilege to exercise his Fifth Amendment right by remaining silent during the search of his home and while confined by the police. In turn, the government's use of petitioner's silence during this period to impeach his direct testimony and commenting on his pre-arrest silence in closing argument violated the due process clause of the Fourteen-

th Amendment. *Doyle v. Ohio, supra.*

II.

WHETHER AN ERROR OF CONSTITUTIONAL MAGNITUDE INDUCED BY THE STATE BY CROSS-EXAMINING DEFENDANT AS TO HIS PRE-ARREST SILENCE AND COMMENTING ON SAME DURING ARGUMENT CONSTITUTES PLAIN ERROR WHERE THE QUESTIONS AND SUBSEQUENT COMMENT CARRY AN INTOLERABLE PREJUDICIAL IMPACT.

A review of the questions asked by the State prosecutor in the state of the case, *supra*, reveals that his interrogation of the petitioner sought answers as to why he did not tell the police executing the search warrant where the purse was located; why he didn't inform the police that the purse was a gift from George Foley; that George Foley paid for it and showed him a receipt; and finally, why he kept silent when the officer came into the room with the purse instead of stating that he had received the purse from George Foley as a gift.

In closing argument, the prosecutor severely compounded the constitutionally impermissible references to petitioner's silence by stating how could the petitioner be an honest man when he failed to tell the officers where the purse was located and by failing to tell the police that the client gave it to him as a gift (R 1110).[1]

In the *Hale* case, it was held that even a jury instruction to disregard the questioning of the defendant as to his silence during police interrogation was insufficient to cure the error.

1. By implication, the prosecutor prefaced these comments by stating that petitioner with twenty years of legal training and a former public defender [should have spoken] (R 1109, 1110). At the conclusion of the government's argument, defense counsel moved for a mistrial (R 1138).

In *Henderson, supra,* no objection was made during closing argument when the prosecutor commented on defendant's silence at the time he was searched. The Fifth Circuit held such comment to be plain error referring to this Court's statement in *Hale* that a defendant's silence during police interrogation lacked significant probative value and that any reference to this silence under such circumstances carried with it an intolerable prejudicial impact.

In *United States v. Edwards*, 576 F.2d 1152 (5th Cir. 1978), it was held that a prosecutor's comments on a defendant's silence may constitute plain error and a judge's cautionary instruction would not suffice to cure the error. Accordingly, the Fifth Circuit found defendant's failure to object on the appropriate grounds did not preclude review and reversal where the prosecutor's comments as to defendant's silence were intended to shore up his less-than-overwhelming evidence and letting the jury make inferences of guilt from defendant's silence. Then the Court opined ". . . we note that the comment upon silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete. We suggest that it be abandoned as a prosecutorial technique."

CONCLUSION

The right to remain silent is premised upon a Constitutional provision. Further, the prosecutor's cross-examination of petitioner concerning his silence and reference to his silence in closing argument in a case bottomed on highly conflicting evidence constituted plain error.

Therefore, the petition for a writ of certiorari to the District Court of Appeal of Florida, Third District should be granted.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1977

CASE NO. 74-863

WALTER B. LEBOWITZ,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

Opinion filed March 10, 1977

An Appeal from the Circuit Court for Dade County, Sidney M. Weaver, Judge.

Robert A. Shupack, for appellant.

Robert L. Shevin, Attorney General, and Linda Collins Hertz, Assistant Attorney General, for appellee.

Before HENDRY, C.J., and PEARSON and HAVERFIELD, JJ.

PEARSON, Judge.

The appellant was convicted in a jury trial of the crime of

buying, receiving or concealing stolen property, to wit: a purse, in violation of Section 811.16, Florida Statutes (1973). He appealed from the judgment, and this court entered an affirmance on the judgment in an opinion filed May 27, 1975 (313 So.2d 473). The Supreme Court of Florida, thereafter, denied certiorari, finding that it was without jurisdiction (330 So.2d 19). Subsequently, the cause came to be heard before the Supreme Court of the United States (October term, 1976) upon a petition for writ of certiorari to this court. The petition resulted in a mandate of the Supreme Court of the United States, entered October 4, 1976 (_____U.S._____, 97 S.Ct. 44, 50 L.Ed.2d 68) vacating the judgment of this court and remanding the cause for consideration by us in light of Doyle v. Ohio, 426 U.S.____, 96 S.Ct.2240, 49 L.Ed.2d 91 (1976).

The facts of this case, which are set out in our prior opinion (see 313 So.2d 473), culminated in the issuing of a search warrant, resulting in the police going to the home of the appellant at 8:00, Saturday morning, December 8, 1973. At that time, the police searched the appellant's home and found the purse in question.

When the appellant took the stand and was cross-examined by the State, the prosecutor asked the appellant a series of questions about his silence with regard to the location of the purse during the search of his home by the police officers. In this regard, appellant takes the position that he was denied his right to remain silent and free from self-incrimination under the Fifth Amendment, and also denied his right to a fair trial, where the prosecutor inquired on cross-examination concerning his failure to explain to the police his possession of recently stolen property.

The question now before us, upon the mandate of the Supreme Court of the United States remanding the case to us, is to consider whether the recent case of Doyle v. Ohio, 426 U.S.____ , 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), changes the result in the present case. We hold that it does not.

Upon consideration of this case in light of Doyle, we find two critical distinctions between the two cases. First of all, the Doyle case is "post-arrest" oriented. Secondly, the Doyle case involved repeated objections to the questions asked on cross-examination. In the present case, the cross-examination did not refer to "post-arrest" silence but rather to silence that took place at the time of the search of the appellant's home. Also, unlike Doyle, the present case involved no objection to the cross-examination questions.

To quote from Mr. Justice Powell, delivering the opinion of the court in the Doyle case, "The question in these consolidated cases is whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving Miranda warnings at the time of his arrest. *We conclude that the use of the defendant's post-arrest silence in this manner violates due process*, and therefore reverse the conviction of both petitioners." [Emphasis added] A reading of Mr. Justice Powell's opinion leaves no doubt that the thrust of the case was "post-arrest" oriented.

Further, we note Mr. Justice Powell's recognition of the fact that ". . . unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination some defendants would be able to frustrate the truth-seeking function of

a trial by presenting tailored defenses insulated from effective challenge." [1]

Additionally, we are buttressed here by the fact that in Doyle objections were made to the cross-examination questions, whereas in the present case, objections were not made. See Cali v. State, 111 So.2d 703 (Fla. 2d DCA 1959); and cf. Tafera v. State, 223 So.2d 564 (Fla. 3d DCA 1969).

We, therefore, conclude that the Doyle case is not controlling in the present instance and, accordingly, we hereby reaffirm our prior decision in this case.

Affirmed.

HENDRY, Chief Judge, dissents.

---

1. Doyle v. Ohio, 426 U.S.____, 96 S.Ct. 2240, 49 L.Ed.2d 91 at 97 (1976), footnote 7.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
Wednesday, April 13, 1977
JANUARY TERM, A.D. 1977

CASE NO. 74 - 863

WALTER B. LEBOWITZ,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk, District court of Appeal,
Third District

By:
Chief Deputy Clerk

cc: Robert A. Shupack
Robert L. Shevin

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, DECEMBER 13, 1978

CASE NO. 51,531

WALTER B. LEBOWITZ,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

The Court having accepted jurisdiction, and upon further consideration of the matter, we have determined that the Court is without jurisdiction. Therefore, certiorari is denied.

ENGLAND, C.J., OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Sidney M. Weaver, Judge

Robert A. Shupack, Esquire
Linda Collins Hertz, Esquire

APPENDIX D

IN THE
SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1975

NO. 75-1756

WALTER B. LEBOWITZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

October 4, 1976. On Petition for writ of certiorari to the District Court of Appeal of Florida, Third District. Petition for writ of certiorari granted, judgment vacated and case remanded to the District Court of Appeal of Florida, Third District, for further consideration in light of Doyle and Wood v. Ohio, 426 US 610, 49 L Ed 2d 91, 96 S Ct. 2240 (1976).

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1975

CASE NO. 74-863

WALTER B. LEBOWITZ,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.

Opinion filed May 27, 1975.

An Appeal from the Circuit Court for Dade County, Sidney M. Weaver, Judge.

Philip Carlton, Jr. and Arthur Joel Berger, for appellant.

Robert L. Shevin, Attorney General, and Linda C. Hertz, Assistant Attorney General, for appellee.

Before PEARSON, HENDRY, and HAVERFIELD, JJ.

PER CURIAM.

The appellant was convicted by a jury of the crime of buy-

ing, receiving or concealing stolen property, to wit: a purse, in violation of Fla.Stat. § 811.16, F.S.A. He appeals therefrom, and we affirm.

Six points have been raised on appeal; however, in his reply brief, appellant abandons his first point.

Appellant is an attorney with experience in criminal law. His chief accuser, and the state's star witness during the trial, was one George Foley.

Foley testified that the appellant requested that he (Foley) go to the Neiman-Marcus Department Store, located in Bal Harbour, wherein he would find a Judith Lieber brand purse, about six inches long, egg shaped, with spangles on it and two silver chains. Appellant indicated that the purse was worth about $200, and his wife desired to have it for a society affair.

Foley was appellant's client and a convicted felon for crimes of theft and forgery. Foley testified that the appellant wanted him to secure the purse by means of a false check.

Foley did so, but a few days later he returned the purse and received $208 from the store as a cash refund. Then some four days later, on November 30, 1973, Foley went back to Neiman-Marcus, this time accompanied by his roommate, John Sankey. The two men succeeded in stealing the purse.

Foley testified that he and Sankey then drove directly to the appellant's Miami Beach home, and Foley went inside

and delivered the purse to the appellant who paid him $50 for his effort.

The appellant took the stand in his own behalf, and his account was sharply different. Appellant testified that he was holding a conference with Foley in his office, when he mentioned that he was busy and that he had to go to Neiman-Marcus to purchase the purse which his wife had seen and wanted.

Appellant stated that Foley offered, as a good-will gesture, to buy it for the appellant because of all the legal work which appellant had performed on Foley's behalf and also because of appellant's patience in collecting his legal fees from Foley. (Appellant testified that at the time Foley owed him $3,000 in fees.)

Further, appellant testified that several days prior to actually delivering the purse to him in a Neiman-Marcus box, Foley had shown him a receipt for it, and therefore appellant had no reason to suspect that Foley had stolen it.

The record reveals that both Foley and the appellant were subjected to intense examination by an able and competent defense attorney and prosecutor. Three of the five points on appeal concern the cross-examination in this case.

First, appellant argues that he was denied his right to remain silent and free from self-incrimination under the Fifth Amendment, and also his right to a fair trial, where the prosecutor inquired on cross-examination concerning the failure of the appellant to explain his possession of recently stolen property to law enforcement officers who were executing a

search warrant in the appellant's home, seeking to find the purse.

The warrant was issued based upon an affidavit by a Miami Beach police officer and an affidavit by Foley, who was arrested a couple of days after he stole the purse and told police he had given it to the appellant. It was executed on December 8, 1973, a Saturday, at 8 o'clock in the morning.

The record reveals the following testimony by the appellant on cross-examination:

> "Q [By Mr. Carhart] Okay. Now, the police say that when they got finished reading the warrant, you invited them to go search. Is that true?
> "A No, sir.
>
> "Q You didn't tell them to go search?
> "A I didn't tell them anything, sir. They said go into the bedroom with your family. We want all three of you that woke up, or that are up, to sit on the bed so that we know where you are, something to that effect.
>
> "Q Did you tell them, hey, I know what you're talking about, and I got a purse just like that upstairs in my bedroom?
> "A We were upstairs when they read the warrant.
>
> "Q Did you say hey, I know what you're talking about, and I got a purse like that right there in the closet?

"A I didn't get a chance to. I walked into the bedroom and like a minute later the officer walked in with the purse.

"Q Did they gag you?

"A I was sleeping when the maid called me, sir. I just had been awakened.

"Q But now you're awakened. Now you're listening to the search warrant, and when they finished reading the warrant, did you say, just a second, gentlemen, I know what this is all about and I have got such a purse in my bedroom. I was given it as a gift by George Foley, who showed me a receipt for it. Is that what you said to them?

"A I didn't say anything to them. I followed their instructions, sir.

"Q Well, after they came out with the purse, did you say to them, wait a minute, officers, before you arrest me, or do anything else in this case, let me tell you something. I got that purse. All right. But, I got it from a fellow named George Foley. And, he's got a receipt for it. He paid cash for it. Did you tell them that?

"A When they came into the room, one of the officers read a card to me telling me that I had the right to make a telephone call, which I chose to do.

"Q Came in with the purse and the card?

"A Excuse me, sir.

"Q Came in with the purse and the card?

"A I don't think it was the same officer that came in with the purse.

"Q When the officer with the purse walked into the room –

"A Yes, sir.

"Q -- is that when you told them, hey, I got this purse from George Foley as a gift?

"A I didn't make any statement to the officers. They did not ask me and I did not respond."

As can be seen, appellant's counsel did not interpose any objection during this exchange. Nevertheless, it is urged that the prosecutor's interrogation was plain error of constitutional magnitude, and therefore this court must reverse.

Since the United States Supreme Court handed down its decision in Harris v. New York, 401 U.S. 222, 91 S.Ct. 943, 28 L.Ed.2d 1 (1971), there has been a clear divergence of opinion among members of the federal judiciary as to the precise issue raised by the appellant under this point. See, United States v. Ramirez, 441 F.2d 950 (5th Cir. 1971); United States ex rel. Burt v. New Jersey, 475 F.2d 234 (3rd Cir. 1973); United States v. Anderson, 498 F.2d 1038 (D.C.Cir. 1974), see also Judge Wilkey's dissent; Deats v. Rodriguez, 477 F.2d 1023 (10th Cir. 1973), see also Judge Barrett's dissenting opinion; Johnson v. Patterson, 475 F.2d 1066 (10th Cir. 1973), see, Judge Breitenstein, dissenting.

In Harris v. New York, supra, the U.S. Supreme Court stated:

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [Citations omitted.] Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process."

In Harris, the court held that the standards enunciated by the court in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), would not serve to shield a defendant from perjury by confronting him with a prior inconsistent statement.

The courts which have expressed the view that Harris does not apply where the defendant has stood mute (therefore making no "statement"), have reasoned simply that there has been no prior inconsistent statement, therefore no potential perjury; and the defendant may not be penalized for his prior silence when he subsequently takes the witness stand in his own behalf.

However, we align ourselves with those federal courts (including the U.S. 5th Circuit in United States v. Ramirez, supra) and those federal judges who have concluded that once the defendant takes the stand in his own defense, he waives his immunity under the Fifth Amendment and subjects himself, like any other witness, to the full truth-testing process. It is our view that such a waiver should not be partial, and the prosecution should not be unfairly hamstrung in testing a defendant's credibility.

We agree with Judge Breitenstein's reasoning in his dissenting opinion in Johnson v. Patterson, supra. wherein he commented:

> "My position is that when a defendant testifies he may be impeached like any other witness. The use of pre-trial silence for impeachment depends on whether, in the circumstances presented, there is such inconsistency between silence and testimony as to reasonably permit the use of silence for credibility impeachment. In the case at bar the trial court did not exercise the discretion which it has in this area because there was no contemporaneous objection. I believe that the cross-examination was proper for impeachment purpose because common sense teaches that on arrest for forcible rape an accused will claim consent if such be the fact."

In the cause sub judice, there likewise was no contemporaneous objection. Also present in the instant case is a deeply-rooted common law inference that guilty knowledge may be drawn from the fact of unexplained possession of stolen goods. See, Barnes v. United States, 412 U.S. 837, 37 L.Ed.2d 380, 93 S.Ct. 2357 (1972); State v. Young, Fla. 1968, 217 So.2d 567.

The appellant staunchly denied ever suggesting to Foley that he steal the purse, adding, "I wouldn't jeopardize my practice and my possessions for a silly $200 purse."

In such a light, we think the state's cross-examination was a logical and common sense test of the appellant's credibility

and one which the appellant certainly invited by his own testimony on direct examination. Indeed, we think that to have denied the state the right to point out the appellant's previous silence, in light of his elaborate version at trial of his transaction with Foley concerning the purse, would have been unfair to the state.

Next, appellant raises two points which focuses our attention upon the cross-examination by defense counsel of the witness Foley. Appellant first asserts that the trial court denied him due process and his right of confrontation by refusing to permit the appellant to impeach Foley's credibility by use of conversations which the defendant had with psychiatrists.

Appellant vigorously attacked Foley's competence to testify as a witness due to his past mental problems. Outside of the jury's presence, appellant offered a psychiatrist with the Florida Division of Corrections who evaluated Foley at the state's Lake Butler Center. The psychiatrist diagnosed Foley as chronically schizophrenic.

However, the state also presented another psychiatrist and profferred two others who felt Foley was competent to testify. The record shows that the trial judge ruled that the jury could hear psychiatric opinions concerning Foley's competence but no specific conversation between the patient and psychiatrist during their consultations.

We find no abuse of discretion in the court's ruling. See, 35 Fla.Jur., Witnesses §53. We note that Foley specifically objected to revelation of any of his communications with the psychiatrists, and under Fla.Stat. §90.242, F.S.A. his con-

versations with the psychiatrists were privileged, *Cf.*, Schetter v. Schetter, 1970, 239 So.2d 51.

Moreover, any error in the court's ruling was harmless under Fla.Stat. § 924.33, F.S.A. because from the record we cannot find that the appellant called any of the psychiatrists to testify before the jury concerning Foley's alleged incompetence. Also, the record shows that defense counsel managed quite skillfully to elicit from Foley for the benefit of the jury some of the rather bizarre statements Foley supposedly had made to psychiatrists (including his statements regarding his connections with the F.B.I. and the Mafia and his statement that while in Vietnam, for some reason, the F.B.I. attempted to shoot down his helicopter).

We would point out also that Foley testified on cross-examination that he had a college degree in psychology and that he was proficient at lying or otherwise faking his replies to the psychiatrists and feigning his behavior traits so that he could be declared insane and avoid criminal responsibility for many of the charges against him.

The next point raised by the appellant questions the state's introduction of testimony regarding the commission of alleged collateral crimes by the appellant, most of which involved his relationship with the witness Foley.

Appellant contends that the prosecutor was overzealous; acted in violation of the so-called Williams rule [See, Williams v. State, Fla. 1959, 110 So.2d 654; Drayton v. State, Fla. App. 1974, 292 So.2d 395]; and therefore prejudiced his right to a fair and impartial trial.

The Williams rule, as this court stated in Drayton, is an evidentiary rule which requires that where the state introduces evidence of other crimes, they must be relevant to a matter at issue. See also, Lawson v. State, Fla.App. 1974, 304 So.2d 522. One such issue specifically stated in Drayton was the defendant's alleged guilty knowledge.

In the instant case, as we have previously said, the appellant vehemently denied knowledge that the purse was stolen by Foley. However, on cross-examination of Foley by the defense it was brought out that Foley was attempting to "set up" the appellant, cooperating with the police by attempting to deliver a stolen television set to the appellant.

In addition, defense counsel also drew a reply from Foley on cross-examination that any legal work which the appellant ever performed for Foley was paid for with stolen "merchandise, money and different things that he (the appellant) wanted."

On redirect, Foley stated that on several other occasions he had delivered stolen television sets to the appellant and stolen airline tickets.

In sum, we think that the appellant himself opened the inquiry into alleged collateral criminal activity between himself and Foley and possibly other clients. It is our conclusion that these collateral matters were relevant to the issue of guilty knowledge, and reversible error has not been shown.

Appellant's last two points challenge an alleged conversation between a juror and a state's witness during a lunch break, and the sufficiency of the search warrant procured by

the police.

With respect to the first two points, appellant concedes that his motion for a new trial (which first brought to the trial court's attention the alleged contact between a juror and a witness) was filed untimely. Therefore, this matter has not been preserved for our consideration on appeal at this time. See, Thompson v. State, Fla.App. 1974, 300 So. 2d 301; Thomas v. State, Fla.App. 1971, 250 So.2d 308.

We would observe that in order to set aside a jury verdict due to misconduct, the alleged misconduct must be shown to have influenced the verdict and to have caused injury to the complaining party. Russom v. State, Fla.App. 1958, 105 So. 2d 380. The record before us is devoid of any evidence indicating adverse influence upon any member of the jury stemming from the contact between the juror and witness.

The witness, an employee of Neiman-Marcus, was called by the state basically to establish that the purse had been stolen from the store. Without more appearing in the record, it would be impossible for this court to conclude that any juror could have been prejudiced or improperly swayed by the lunchroom conversation.

Lastly, appellant's contention that the affidavits by a police officer and Foley were constitutionally defective and insufficient under Fla.Stat. § 933.18, F.S.A. to authorize a finding of probable cause for issuance of a search warrant by an independent magistrate has been considered and found unmeritorious.

We have examined the two affidavits, and we find therein

ample facts within the personal knowledge of the two affidavits to justify issuance of a search warrant. See, State v. Wolff, Fla. 1975, _____ So.2d _____, (Case No. 45,447, filed February 26, 1975); Andersen v. State, Fla. 1973, 274 So.2d 228; Reed v. State, Fla. 1972, 267 So.2d 70.

Therefore, for the reasons stated and upon the authorities cited and discussed, the judgment and sentence appealed are affirmed.

Affirmed.